[Cite as *State v. Hensley*, 2015-Ohio-911.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

State of Ohio — Court of Appeals No. OT-14-004

Appellee — Trial Court No. 09-CR-181

v.

Robert Hensley — **DECISION AND JUDGMENT**

Appellant — Decided: March 13, 2015

* * * * *

Mark Mulligan, Ottawa County Prosecuting Attorney, and
Joseph H. Gerber, Assistant Prosecuting Attorney, for appellee.

Nancy L. Jennings, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, Robert J. Hensley, appeals from a judgment of the Ottawa County Court of Common Pleas wherein the court revoked his community control sanctions for violating the conditions thereof and sentenced him to five years incarceration. For the reasons that follow, we affirm.

{¶ 2} Appellant's appointed counsel has requested leave to withdraw in accordance with the procedure set forth in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). In *Anders*, the U.S. Supreme Court held that if counsel, after a conscientious examination of the appeal, determines it to be "wholly frivolous" he should so advise the court and request permission to withdraw. *Id*. at 744. The request shall include a brief identifying anything in the record that could arguably support an appeal. *Id.* Counsel shall also furnish his client with a copy of the request to withdraw and its accompanying brief, and allow the client sufficient time to raise any matters that he chooses. *Id*. The appellate court must then conduct a full examination of the proceedings held below to determine if the appeal is indeed frivolous. If the appellate court determines that the appeal is frivolous, it may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 3} Appellant's appointed counsel here has met the requirements set forth in *Anders*. *Id*. Consistent with *Anders*, counsel has, concurrently with the filing of her brief to this court, informed appellant of his right to file his own assignments of error and appellate brief. Appellant has not done so at this point. Consequently, this court will proceed examining the potential assignments of error set forth by counsel, as well as the record from below to discern whether appellant's appeal lacks merit sufficient to deem it wholly frivolous.

{¶ 4} On March 18, 2010, appellant entered a guilty plea to one count of Burglary, a violation of R.C. 2911.12(A), and one count of Possession of Criminal Tools, a violation of R.C. 2923.24(A). The court sentenced him to five years for burglary and one year for possession of criminal tools. The sentences were ordered to be served concurrently. The court, however, suspended the sentences and placed appellant on community control. R.C. 2929.15(A).

{¶ 5} Appellant subsequently violated his community control sanctions when he was charged with having no operator's license, failing to control a motor vehicle, driving while intoxicated, leaving the scene of an accident, violating curfew, and unlawful possession of a stolen vehicle. The court revoked his community control and reinstated the five-year prison-sentence pursuant to R.C. 2929.15(B)(1)(c). Appellant now appeals setting forth two potential assignments of error.

I. Appellant was denied his fourteenth amendment right to due process when the trial court revoked his probation.

II. The trial court abused its discretion when imposing sentence upon defendant.

{¶ 6} In appellant's first potential assignment of error, he asserts that the revocation of his community control was a violation of his Fourteenth Amendment right to due process. *Gagnon v. Scarpelli*, 411 U.S. 778, 781, 93 S. Ct. 1756, 36 L. Ed. 656 (1973).

{¶ 7} A trial court's decision to revoke probation is reviewed for an abuse of discretion. *State v. Scott*, 6 Ohio App.3d 39, 41, 452 N.E.2d 517 (2d Dist.1982). Abuse of discretion implies that the court's ruling was unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 8} The state's burden at a probation revocation hearing is not proof beyond a reasonable doubt. *State v. Hilson*, 7th Dist. Mahoning No.11-MA-95, 2012 Ohio 4536, ¶ 10. Instead, the state need only present evidence of a substantial nature showing that the probationer has breached a term or condition of his probation. *Id.*

{¶ 9} Pursuant to Crim.R. 32.3(A), "[t]he court shall not impose a prison term for violation of the conditions of a community control sanction or revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which action is proposed." Due process requires that before revoking community control, the trial court must (1) hold a hearing to determine if probable cause exists to believe the defendant has violated the terms of his probation and then (2) hold a hearing to determine if probation should be revoked. *State v. Harris*, 7th Dist. Mahoning No.11-MA-51, 2012 Ohio 1304, ¶ 15.

{¶ 10} Here, appellant was represented by counsel at each stage of the revocation process. Moreover, appellant was given a lawful hearing and, had been through the process numerous times as a repeat violator. Appellant further admitted to actually violating his community control, and the trial court did not err in revoking his community control as a result. Appellant's first proposed assignment of error is not well-taken.

{¶ 11} In appellant's second potential assignment of error, he asserts that the sentence given was unreasonable and therefore contrary to law under R.C. 2953.08(A)(4).

{¶ 12} When reviewing appeals of criminal sentences, the appellate court shall review the record, including the findings underlying the sentence or modification given by the sentencing court. R.C. 2953.08(G)(2). Following the review, the appellate court may modify a sentence that is appealed or may vacate the sentence and remand the matter to the trial court for resentencing. *Id*. The standard for review is not whether the sentencing court abused its discretion, but rather the court may take action if it clearly and convincingly finds that (a) the record does not support the sentencing court's findings under division (B)(2)(e) or (C)(4) of section 2929.14 of the Revised Code; or, (b) that the sentence is otherwise contrary to law. *Id*.

{¶ 13} The controlling statutes on felony sentences at issue in this case are as follows. R.C. 2929.14(A)(1) provides the prison term for felonies in the third degree as one, two, three, four, or five years. R.C. 2929.14(A)(4) provides the prison term for felonies in the fifth degree as six, seven, eight, nine, ten, eleven, or twelve months.

{¶ 14} Here, appellant received five years for the burglary and one year for the possession of criminal tools. Appellant was however only sentenced to serve five years total for the two charges because the sentences were to run concurrently.

{¶ 15} The trial court addressed the various factors listed in R.C. 2929.14(C)(4), including appellant's criminal history, amount of harm caused by the crimes, and the

seriousness of the criminal conduct. Despite having no other adult offenses, appellant had a juvenile record that was three-and-a-half pages long, and the record was almost exclusively comprised of theft and drug offenses. The record thus indicated that appellant had been a repeat offender for the better part of seven years. Based on the foregoing, appellant's second proposed assignment of error is not well-taken.

{¶ 16} Upon this record, this court concurs with appellant's counsel that appellant's appeal is without merit. Also, upon our own independent review of the record, it is appropriate to conclude that there is no other ground upon which a meritorious appeal may be founded. Consequently, this appeal is found to be without merit and thus "wholly frivolous." *Anders*, 386 U.S. at 744, 87 S.Ct. 1396, 18 L.Ed.2d 493. Counsel's motion to withdraw is found well-taken and is granted.

{¶ 17} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R.24. The clerk is ordered to serve all parties with notice of this decision.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
CONCUR.
JUDGE